SUPREME COURT, U. S.
No. 73-1017
FILED
JAN 29 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1017

UNITED STATES OF AMERICA,

Petitioner,

against

WALT DISNEY PRODUCTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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UNITED STATES OF AMERICA,
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WALT DISNEY PRODUCTIONS,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

This brief is submitted on behalf of Walt Disney Productions in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTION PRESENTED

Whether a writ of certiorari should issue to review the judgment below affirming the district court and holding that a motion picture negative used to manufacture prints

for exhibition is an item of "tangible personal property" for investment credit purposes [Internal Revenue Code of 1954, §§ 38, 46, 47 and 48] solely because petitioner asserts, without any support in the record, that it will sustain a very large revenue loss unless that judgment is reversed, where there is no conflict between circuits or with decisions of this Court, where the decision below was unanimous and no judge of the Ninth Circuit suggested a vote on petitioner's suggestion for rehearing *en banc*, and where the pertinent legislative history overwhelmingly supports and expressly approves the result reached by the district and circuit courts.

COUNTER-STATEMENT

Petitioner's statement of the case is incomplete and misleading and inaccurately summarizes the holdings of the two courts below, as will appear from the following counter-statement:

Disney's principal business activities since its organization in 1938 have been the production and distribution of motion picture films oriented to family entertainment and the operation of family recreational centers. The record in the district court establishes that Disney's completed motion picture film negatives are used to manufacture, or "strike," positive prints which are then shown in theatres, on television, or in homes, schools, and other places of non-theatrical entertainment.[1] A positive print can only be used for a limited number of exhibitions before becoming

[1]Petitioner refers to the use of the matrix to make prints. Pet. at 3. Each matrix, itself a form of positive print made directly from the negative, can be used to strike from 20 to 75 prints before wearing out, at which time another matrix must be made. The matrix merely preserves the useful life of the negative [R. 67]. (For the form of citations, see note 2 *infra*.)

worn; at that point, replacement prints must be manufactured in order to continue exhibition [R. 893].[2]

On its income tax return for its fiscal year ended September 29, 1962, Disney claimed an investment credit in the amount of $99,160 on the cost of producing eight such negatives. The Internal Revenue Service disallowed the claimed credit, Disney filed a claim for refund which the Internal Revenue Service disallowed, and the refund suit followed in the district court.

The district court ruled that "[t]he evidence amply supports" a finding of fact that each of the negatives "had at the time of being placed in service a useful life of eight years." *Walt Disney Productions* v. *United States,* 327 F. Supp. 189, 190 (C.D. Cal. 1971); Pet. App. A at 3a. The district court also held that the negatives were "tangible personal property" within the meaning of section 48(a)(1)(A) of the Internal Revenue Code:

> "The motion picture negatives here certainly are tangible—weighing between 27 and 51 pounds, between 5000 and 11,800 feet in length and capable of being seen and touched. The negatives are physically used in the manufacture of prints which are [Disney's] stock in trade to its consumers. It is this use which establishes the eligibility as 'tangible personal property.'" 327 F. Supp. at 192; Pet. App. A at 6a-7a (footnote omitted).

In arguing that the negatives were not tangible the Government relied on an example contained in section 1.48-1(f) of the Income Tax Regulations, which provides in pertinent part:

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[2] Throughout this brief "R." references are to the duplicated volumes of the record on appeal; "Pet." references are to the Petition for Certiorari; "Pet. App." references are to the appropriate Appendix to the Petition for Certiorari.

> "The cost of intangible property, in the case of a patent or copyright, includes all costs of purchasing or producing the item patented or copyrighted. Thus, in the case of a motion picture or television film or tape, the cost of the intangible property includes manuscript and screenplay costs, the cost of wardrobe and set design, the salaries of cameramen, actors, directors, etc., and all other costs properly includible in the basis of such film or tape." Treas. Reg. § 1.48-1(f)(1964).

The district court held that the regulation was invalid since it improperly ascribed to the intangible statutory copyright the costs of producing the tangible negatives. After noting that the intangible copyright "is the *right* to multiply copies of a literary, intellectual or artistic property" [327 F. Supp. at 192; Pet. App. A at 7a (emphasis in original)], the court stated:

> "To accept [petitioner's] intrepretation of copyright property would exclude 'tangible personal property' where the owner of the property in order to guarantee to himself the exclusive right to reproduce the 'tangible personal property' obtains a patent or copyright. The fallacy of the major premise is obvious." 327 F. Supp. at 192; Pet. App. A at 7a-8a.

The district court went on to observe that:

> "We are not here concerned with a prototype-experimental film. The motion picture negatives which concern us are the vehicle for creation of [Disney's] stock in trade—it is *a tool* together with the reproduction processes which allows [Disney] to produce its inventory. Without *this* negative no positive print would be available to [Disney] to

> carry out its everyday business." 327 F. Supp. at 192; Pet. App. A at 8a (emphasis in original).

On appeal, the court of appeals sustained the district court's useful life findings and also declared the regulation to be invalid as "plainly inconsistent with the expressed purpose of the applicable statute as shown by the legislative history." *Walt Disney Productions* v. *United States,* 480 F. 2d 66, 68 (9th Cir. 1973); Pet. App. B at 12a. The court stated:

> "In attributing all of Disney's labor and production costs of the negatives to the copyrighted print, the regulation defeats the purpose of the credit. . . . Disney argues that its film negatives, like the hypothetical production machines, are standardized units of depreciable property which Disney uses to produce other products, the positive prints, and that the attribution of all the value of the film to the copyright, like the attribution of all the value of a machine used in production to a patent eventually procured on it, is unwarranted. We agree." 480 F. 2d at 68; Pet. App. B at 13a.

REASONS FOR DENYING THE PETITION

The status of Disney's negatives as "tangible personal property" is a simple, clear-cut issue, limited to the years 1962-1969, which has been resolved against petitioner by Congress and by two courts below. There is no conflict between the circuits or with other decisions of this Court.[3] Consequently, petitioner's unsupported statements

[3] There is a possibility of conflict in the future. In addition to Disney's cases, there are, according to petitioner, five other cases in litigation, each of which is pending in the Court of Claims. Pet. at 6 n.5.

concerning its assumed revenue loss are especially irrelevant in determining whether a writ of certiorari should issue.[4]

1. Petitioner's claims concerning assumed revenue losses do not furnish any responsible support for a petition for certiorari on the record and in the circumstances of this case.

There is no basis in the record or in the petition to support petitioner's grossly exaggerated estimates of the fiscal significance of this case.[5] And even if there were, it does not at all follow that the number of dollars involved has any bearing on the correctness of the decision below, or on the necessity of its review by this Court.

Moreover, it is premature for petitioner to state, solely on the basis of its experience in this case, that if negatives qualify for the credit there will be a revenue loss measured

[4] Petitioner knows well that revenue loss is not surprising in the context of the investment credit provisions. Over $16 billion of useable credits have been claimed from the inception of the investment credit in 1962 through taxable years ended in June, 1970. U. S. Department of Treasury, Internal Revenue Service, *Statistics of Income, Corporation Income Tax Returns, 1962* at 49, *1963* at 54, *1964* at 46, *1969* (*Preliminary*) at 35; U. S. Department of Treasury, Internal Revenue Service, *Statistics of Income, Individual Income Tax Returns, 1970* at 309. This is in line with the estimate made by the Joint Committee on Internal Revenue Taxation in 1962 that the revenue loss generated by the investment credit for the years 1962 to 1972 would exceed $20 billion. 108 Cong. Rec. 21765 (1962). *See also* S. Rep. No. 1881, 87th Cong., 2d Sess. 7-8 (1962); H. R. Rep. No. 1447, 87th Cong., 2d Sess. 4-5 (1962).

[5] Without knowing how petitioner arrived at its varying estimates, Disney cannot effectively challenge those figures. It would be interesting to know, for example, how many of the more than 500 production companies which petitioner states are located in the Ninth Circuit have filed timely claims for refund and, if so, in what amounts and whether any of those taxpayers aside from Disney have commenced suit thereon. Disney's tax personnel, knowledgeable in the industry, believe, on the basis of their expertise, that the actual revenue loss would be only a small fraction of the potential figures alleged by petitioner.

by seven percent of "virtually all of the costs of motion picture production from 1962 through 1969."[6] Pet. at 5. In view of the special circumstances of this case, that can be true only if every taxpayer can establish a useful life of eight or more years for each negative.[7]

The district court concluded that Disney's negatives each had a useful life of eight years only after finding that "the film productions of [Disney], *unlike many other production companies,* are not so-called 'dated material' . . . ." 327 F. Supp. at 190; Pet. App. A at 3a (emphasis added). On appeal petitioner unsuccessfully challenged the district court's useful life findings and at present petitioner is challenging Disney with respect to the useful life of each negative made by Disney during its fiscal years 1963 through 1969.[8] Petitioner, however, has not tested this issue with respect to any other production company. Until it does, it has no justifiable basis for its estimate of the sheer dollar importance of this case. Accordingly, those estimates should not be considered in determining whether the petition should be granted.

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[6] Disney also fails to understand petitioner's concern that, if negatives qualify as tangible personal property, a portion of overhead costs will qualify for the credit. Pet. at 7-8. Petitioner does not contest the holding of the court of appeals that the basis of each negative for investment credit purposes must be the same as its basis for depreciation purposes. Accordingly, the only overhead expenses which could be subject to the credit would be those which are properly allocable to the negative for depreciation purposes in accordance with standard accounting methods. Petitioner has never objected to the inclusion of such costs in the basis of negatives for depreciation purposes; accordingly, it has no grounds for its objection to their inclusion for investment credit purposes.

[7] To the extent useful life is less than eight years the credit is reduced or, if less than four years, is eliminated. Int. Rev. Code of 1954, § 46(c)(2). Also, the credit cannot be claimed unless the taxpayer has the requisite tax liability. Int. Rev. Code of 1954, § 46 (Appendix A *infra*).

[8] *Walt Disney Productions* v. *United States,* Civil Docket No. 73-2125 (C.D. Cal., filed Sept. 7, 1973).

2. The decisions below are clearly and entirely consistent with, if not mandated by, the legislative history of the investment credit provisions.

When the investment credit was originally adopted in 1962 both the Senate Committee on Finance and the House Committee on Ways and Means stated that, except for certain statutory exclusions not applicable to this case, "*all* tangible personal property qualifies" for the credit, further directing that "*[t]angible personal property is not intended to be defined narrowly here . . . .*" S. Rep. No. 1881, 87th Cong., 2d Sess. 16 (1962); H. R. Rep. No. 1447, 87th Cong., 2d Sess. 11 (1962) (emphasis added).

This specific direction by Congress followed from the underlying legislative purpose of the investment credit provisions to "provide a strong and lasting stimulus to a high rate of economic growth and . . . an incentive to invest comparable to those available elsewhere in the rapidly growing industrial nations of the free world." H. R. Rep. No. 1447 at 8. *See also* S. Rep. No. 1881 at 11. In recognition of this purpose, the courts of appeals in the Second, Seventh, Eighth and Tenth Circuits, as well as the Tax Court, each have held that the investment credit provisions should be interpreted liberally when determining whether investment in a particular type of property qualifies for the credit.[9] No court has held to the contrary.

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[9] *King Radio Corp., Inc.* v. *United States*, 486 F. 2d 1091 (10th Cir. 1973) ("We think that it was the intent of Congress to extend the investment tax credit to as broad a segment of American industry as possible . . . ." *Id.* at 1096); *Minot Federal Savings & Loan Ass'n* v. *United States*, 435 F. 2d 1368 (8th Cir. 1970) ("The statutes and regulations in such matters should be liberally construed consistent with the legislative purpose behind the investment credit statute." *Id.* at 1372); *Northville Dock Corp.* v. *Commissioner*, 427 F. 2d 164 (2d Cir. 1970), *aff'g per curiam* 52 T.C. 68, 73 (1969); *Commissioner* v. *Schuyler Grain Co., Inc.*, 411 F. 2d 649, 652 (7th Cir. 1969), *aff'g* 50 T.C. 265, 269-270 (1968), *acquiesced in*, 1971-2 Cum. Bull. 3; *Beverly R. Roberts*, 60 T.C. No. 91 (Sept. 6, 1973); *accord, Norfolk Shipbuilding & Drydock Corp.* v. *United States*, 321 F. Supp. 222 (E.D. Va. 1971); *F. P. Wood & Son of Elizabeth City, Inc.* v. *United States*, 314 F. Supp. 1205 (E.D. N.C. 1970).

In 1962 Congress also specifically stated that the investment credit was designed to stimulate the growth of national productivity and output, increase the competitiveness of U. S. exports, and aid in correcting an imbalance in the U. S. balance of payments. S. Rep. No. 1881 at 1-2, 10-12; H. R. Rep. No. 1447 at 7-8. Allowing the investment credit with respect to motion picture negatives accomplishes each of those objectives.

The legislative history of the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497, also makes it absolutely clear that motion picture and television negatives are intended to qualify for the credit. The Senate Committee on Finance specifically approved the district court's holding in this case, stating:

> *"Motion picture and television films.*—As previously indicated the investment credit is generally available for depreciable tangible personal property. Questions have arisen, however, whether motion picture and television films are tangible (as distinct from intangible) personal property eligible for the credit. *A court case decided the question in favor of the taxpayer. The committee agrees with the court that motion pictur and TV films are tangibl personal property eligible for the investment credit."* S. Rep. No. 92-437, 92d Cong., 1st Sess. 34 (1971) (emphasis added).

In addition, Chairman Mills of the House Committee on Ways and Means twice stated on the floor of the House that the costs of producing a motion picture film qualify for the investment credit. 117 Cong. Rec. 34894 (1971); 117 Cong. Rec. 45865 (1971).

Petitioner no longer argues, as it did before the Ninth Circuit, that this subsequent legislative history is of "no

relevance."[10] Rather, petitioner argues that the Ninth Circuit should not have assigned "special weight" to this legislative history since Congress intended no inference as to the eligibility of negatives for the credit prior to 1971. Pet. at 16-18. We totally disagree with petitioner's analysis of the "Effective dates" paragraph of the Senate report.[11] Pet. at 16-17. However, even if one were to assume that

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[10] This Court has often held that subsequent legislative history may be considered in interpreting prior legislation on the same subject. *Haynes* v. *United States,* 390 U. S. 85, 87-88 n.4 (1968); *Fribourg Navigation Co.* v. *Commissioner,* 383 U. S. 272, 283-86 (1966); *Great Northern Ry.* v. *United States,* 315 U. S. 262, 277 (1942); *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309 (1911). *See also Minot Federal Savings & Loan Ass'n* v. *United States, supra* note 9; *Bobsee Corp.* v. *United States,* 411 F. 2d 231 (5th Cir. 1969).

In *Sioux Tribe of Indians* v. *United States,* 316 U. S. 317 (1942), the Court was interpreting an 1887 statute. The same Senate Committee which had reported on the 1887 statute issued a report in 1892 in connection with an act on the same general subject passed that year; the 1892 report contained a statement of the Senate Committee's view on the meaning of the 1887 statute. The Supreme Court stated:

> "This statement made by the Committee which reported the . . . Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act." *Id.* at 329-30.

[11] A study of the entire portion of the Senate report (Appendix B *infra*), from which petitioner has quoted only selected language, indicates that the reference to films was an obvious error of draftsmanship. It refers only to "changes" in the definitions of qualifying property "made by" section 104 of the Revenue Act of 1971 and to the "provisions" of that section. However, section 104 of the Act made no "change" and contained no "provision" relating to motion picture and television films. Nor are there any published drafts of section 104 of the 1971 Act containing such language. Rather, the only section of the Code which could relate to films—section 48(a)(1)(A), relating to "tangible personal property"—was left "as is." As shown in the table set forth in Appendix C *infra,* as reproduced from Disney's Answering Brief in the Ninth Circuit, as to *every other* type of property but films listed in the "Effective dates" portion of the Senate Report, section 104 of the 1971 Act worked a specific change in the language of one of the existing subsections of section 48 of the Internal Revenue Code.

Congress did not intend explicitly to decide the issue presented in this case, the court below correctly attributed particular significance to the 1971 legislative history, considering that (i) the relevant statutory language—the phrase "tangible personal property" in section 48(a)(1)(A)—has remained unchanged from 1962 through restoration of the investment credit by the Revenue Act of 1971, and to the present time;[12] (ii) seven members of the Senate Committee on Finance served on that committee both in 1962 and 1971, and Representative Mills chaired the House Committee on Ways and Means during both years;[13] (iii) rather than tacitly approving section 1.48-1(f) of the Income Tax Regulations, which would deny Disney the investment credit, Congress, in restoring the investment credit provisions in 1971, specifically disapproved the content of that regulation; and (iv) there is no persuasive reason why the language "tangible personal property" as applied to motion picture and television negatives should have one meaning in 1962 and another in 1971.[14]

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[12] The credit was suspended as to property constructed or acquired within the period beginning on October 10, 1966, and ending on March 9, 1967. In 1969, the credit was generally terminated for property acquired after April 18, 1969, and for property the construction of which began after that date. The next step in the history of the investment credit was its restoration in 1971.

[13] *Congressional Directory*, 87th Cong., 2d Sess. 235, 253; *Congressional Directory*, 92d Cong., 1st Sess. 254, 276.

[14] Petitioner mistakenly relies upon *Commissioner* v. *Bilder*, 369 U. S. 499 (1962), to support a proposition that identical statutory language may be construed differently when Congress desires to broaden or narrow the reach of a provision. Pet. at 17 n.16. Unlike here, that case involved the ***re-enactment*** of a statute [Internal Revenue Code of 1939, § 23(x) re-enacted as Internal Revenue Code of 1954, § 213] accompanied by a ***change*** in the language of the statute (where Congress added the word "transportation" to the category of deductible medical expenses and stated in the relevant committee reports that the costs of lodging were no longer deductible).

The court of appeals was clearly correct, therefore, when it held that the 1971 legislative history—consisting, as it does, of "explicit Congressional statements of the meaning of a phrase which was unchanged during the period in question"—demonstrates that the regulation "was contrary to the Congressional intent."[15] 480 F. 2d at 69; Pet. App. B at 15a. Consequently, both courts below properly declared section 1.48-1(f) of the Income Tax Regulations, which characterizes motion picture negatives as intangible property, to be invalid.[16]

The invalidity of the regulation arises from its failure to recognize that a motion picture negative in Disney's field of endeavor is the equivalent of a machine. This factual

[15] Petitioner's reliance on the King bill [Pet. at 10], which died in committee in 1963, is misplaced. Numerous decisions of this Court clearly state that it is improper in statutory interpretation cases to attach weight to statements made in connection with legislation not enacted. As this Court has explained, to ascribe such significance to bills not enacted into law would deter individuals and institutions—particularly governmental bodies—from seeking desirable legislative guidance and clarification. *United States* v. *W. M. Webb, Inc.*, 397 U. S. 179, 194 n.21 (1970); *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 169-70 (1968); *Waterman S. S. Corp.* v. *United States*, 381 U. S. 252, 268-69 (1965); *United States* v. *Price*, 361 U. S. 304, 310-12 and n.7 (1960).

[16] The court of appeals expressly recognized that Income Tax Regulations should be sustained unless unreasonable or plainly inconsistent with Congressional purpose. 480 F. 2d at 68; Pet. App. B at 12a. Neither *Brewster* v. *Gage*, 280 U. S. 327 (1930), nor *Lucas* v. *American Code Co.*, 280 U. S. 445 (1930), support petitioner's contention that regulations issued pursuant to a grant of authority as general as that contained in section 38(b) are to be regarded as legislative regulations. Pet. at 11 n.11. Former Assistant Secretary of the Treasury Surrey observes that the weight accorded regulations depends upon the type of statutory language authorizing the regulations. He concludes that regulations issued pursuant to a statutory standard of the type set forth in section 38(b) are hardly legislative regulations; in fact, they are "no more than the Department's construction of the Revenue Act," without "any authority." Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557-58 (1940).

determination was resolved in favor of Disney and against petitioner by both the district court and the Ninth Circuit. The district court recognized that each negative is "physically used in the manufacture of prints which are [Disney's] stock in trade" and properly characterized each negative as "*a tool* together with the reproduction processes which allows [Disney] to produce its inventory." 327 F. Supp. at 192; Pet. App. A at 6a-7a, 8a (emphasis in original). The court of appeals agreed that Disney's "film negatives, like the hypothetical production machines, are standardized units of depreciable property which Disney uses to produce other products, the positive prints." 480 F. 2d at 68; Pet. App. B at 13a. Both courts thus held that there is no basis for concluding, as the regulation did, that the production costs of the tangible negative are incurred to obtain the intangible copyright.

Disney incurs its production costs to manufacture a productive tangible asset, the negative, which is physically used to manufacture its inventory. It does not incur those costs to secure a copyright on the photoplay. It is Disney's ownership and possession of the negative—not the copyright—which give it the unlimited right to strike prints, and it is Disney's ownership and possession of the prints which give it the unlimited right to rent the prints to exhibitors or to license others to do so.[17] The rights flowing

[17] The copyright on the photoplay does not, as petitioner repeatedly and erroneously contends, bestow upon the owner of a negative the right to distribute and exhibit prints manufactured from the negative. Furthermore, the cases cited by petitioner fail to suport the proposition that all of the value of a film negative is attributable to the copyright on the photoplay. We agree completely, for example, with the statement in *Misbourne Pictures Limited* v. *Johnson*, 189 F. 2d 774 (2d Cir. 1951), relied on by petitioner [Pet. at 13], that possession of a negative without rights of distribution would be of "relatively little value." *Misbourne Pictures Limited* at 776. Disney, as owner and sole possessor of its negatives, has *both* possession of the negatives and the right to control their use.

from such ownership and possession do not convert the negative into intangible property any more than the rights associated with ownership and possession of a printing press render it intangible.

The common law copyright affords no protection to the economic value of Disney's films since all of its films are made for immediate public exhibition. The statutory copyright, which is obtained after the negatives are completed, also does not significantly protect the economic value of the films both because the extent of the statutory copyright protection is quite limited as applied to Disney's films and because Disney, as owner of the negatives, has sufficient legal remedies aside from the copyright to preserve at all times their essential economic value.[18]

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[18] As owner and possessor of its negatives, Disney has tort remedies against one who steals its negatives or prints and both contract and tort remedies against one who lawfully has possession of its prints but who unlawfully makes and commercially exploits a duplicate negative or additional prints therefrom. As was the essence of the holding in *Michael Todd Co.* v. *County of Los Angeles*, 16 Cal. Rptr. 921 (Dist. Ct. App. 2d Dist. 1961), *aff'd*, 57 Cal. 2d 684, 371 P. 2d 340, 21 Cal. Rptr. 604 (1962), an owner's common law property rights with respect to a negative are sufficient to preserve the essential economic value of the negative and prints made from it.

Statutory copyright protection does prevent a competitor from plagiarizing a Disney-owned negative by producing his own negative with his own film, his own cast, his own studio, and substantial amounts of his own money. Obviously, this seldom, if ever, occurs. The statutory copyright does not provide even this protection against another producer who uses public domain material on which a Disney film is based or with respect to nature films, films depicting geographical locations, and films based on public or historical events. Given the nature of Disney's business—family entertainment—many of its films fall into one or more of these categories. The other advantages of the statutory copyright are original jurisdiction in federal courts, statutory damages, and certain evidentiary and procedural advantages [28 U. S. C. § 1338(a); 17 U. S. C. §§ 101, 209, 210]; these bolster Disney's exclusive rights to deal with its negatives and prints as it sees fit, but they surely provide no basis for attributing the costs of making the negatives to the statutory copyright.

Similarly, petitioner has no basis for its effort to avoid the compelling legislative history of the investment credit provisions by urging that the words "construction, reconstruction, or erection" in section 48(b) of the Internal Revenue Code of 1954 somehow limit the type of tangible personal property eligible for the credit. Pet. at 9-10. Section 48(b) does not define the *kind* of property eligible for the credit. That section merely deals with *when* a taxpayer must buy or make property in order to qualify for the credit; it provides that the taxpayer may only claim a credit for new property:

> "(1) the construction, reconstruction, or erection of which is completed by the taxpayer after December 31, 1961, or
>
> "(2) acquired after December 31, 1961, if the original use of such property commences with the taxpayer and commences after such date."

It is section 48(a)(1)(A) which defines the kind of property that qualifies for the credit—"tangible personal property"—and the language in the temporal provisions of section 48(b) is of no significance in interpreting that phrase.[19]

[19] We are unaware of any previous instance where petitioner has taken the view that the words "construction, reconstruction, or erection" in section 48(b) redefine the kinds of property eligible for the credit. Indeed, if section 48(b) is definitional, petitioner's position leads to absurd results. For example, a publisher who incurs costs for offset-lithography films and electroplates used in the production of a copyrighted book is entitled to claim a credit for investment in "tangible personal property" under Revenue Ruling 70-403, 1970-2 Cum. Bull. 3. Under petitioner's reading of section 48(b), however, the publisher only secures the credit if he incurs the cost of those items by purchasing them rather than by producing them himself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

STATUTES AND REGULATIONS INVOLVED

Pertinent Statutes and Regulations are set forth in the petition. Pet. App. E. at 20a-30a. Also relevant is the following statutory provision:

Internal Revenue Code of 1954:

> "SEC. 46 [as added by Sec. 2(a), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960].
>
> AMOUNT OF CREDIT.
>
> "(a) *Determination of Amount.*—
>
> * * *
>
> "(2) *Limitation based on amount of tax.*—Notwithstanding paragraph (1), the credit allowed by section 38 for the taxable year shall not exceed—
>
> "(A) so much of the liability for tax for the taxable year as does not exceed $25,000, plus
>
> "(B) for taxable years ending on or before [March 9, 1967], 25 percent of so much of the liability for tax for the taxable year as exceeds $25,000, or
>
> "(C) for taxable years ending after [March 9, 1967], 50 percent of so much of the liability for tax for the taxable year as exceeds $25,000."
>
> * * *
>
> [NOTE: For applicable carryback and carryover periods with respect to unused credits, see section 46(b).]

Appendix B

EFFECTIVE DATES PROVISION OF SENATE REPORT ON REVENUE ACT OF 1971

S. Rep. No. 92-437, 92d Cong., 1st Sess. 34 (1971):

> "In general, *the changes made by this section* [*104*] *of the* [*1971*] *bill* are to apply only to qualifying property [defined earlier as tangible personal property acquired, constructed, reconstructed, or erected by the taxpayer after August 15, 1971]. *These changes* include those made in the treatment of: storage facilities; coin-operated machines in apartment buildings; property used outside the United States in connection with exploring or extracting natural resource deposits from ocean waters or submarine deposits or the furnishing of telephone service; livestock; property subject to special amortization; and *motion picture and television films. With respect to these provisions,* no inference is intended as to the proper treatment of these types of property under prior law." (Emphasis added.)

Appendix C

AMENDMENTS OF SECTION 48 OF THE CODE MADE BY SECTION 104 OF THE REVENUE ACT OF 1971.

Type of Property:	*Covered by Code Section:*	*Amendment made by Revenue Act of 1971 Section:*
Comsat	48(a)(5)	104(c)(1)
	48(a)(2)(B)(viii)	104(c)(2)
Railroad track	48(a)(9)	104(g)
Storage facilities	48(a)(1)(B)(iii)	104(a)(1)
Coin-operated machines in apartment buildings	48(a)(3)(C)	104(b)(3)
Property used outside U.S. for underwater exploration, extracting or telephone service	48(a)(2)(B)(x)	104(d)
	48(a)(2)(B)(ix)	104(c)(3)
Livestock	48(a)(6)	104(e)
Property subject to special amortization	48(a)(8)	104(f)(1)
Motion picture and television films	48(a)(1)(A)	None